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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 930

FRANKLIN W. BAUMGARTNER and THE STATE OF NEBRASKA,
Petitioners,

VERSUS

GULF OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Nebraska (Pet. App. 1-21) is reported at 168 N.W.2d 510.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on May 9, 1969. A timely petition for rehearing was denied on September 16, 1969. The petition for certiorari was filed December 8, 1969. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States compel the State of Nebraska to impose upon the participants in a unit for the secondary recovery of oil by waterflooding, which was duly authorized and lawfully operated under the Nebraska Oil and Gas Conservation Act, liability for oil drained from an undeveloped offsetting lease which could not have been produced in the absence of unit operations, in which the offsetting lessee refused to join on a fair and equitable basis.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, § 1.

The Nebraska Oil and Gas Conservation Act, Revised Statutes of Nebraska 1943, Reissue of 1960, §§ 57-901 - 57-921, provides in pertinent part:

> "**57-901. Oil and gas conservation; purpose.** It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; and that the correlative rights of all owners be

fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined and subject further to the enforcement and protection of correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom."

"57.910. Unit or cooperative development; agreement; effect. An agreement for the unit or cooperative development and operation of a field or pool, or a part of either, including those in connection with the conduct of repressuring or pressure maintenance operations, cycling or recycling operations, including the extraction and separation of liquid hydrocarbons from natural gas in connection therewith, water floods or any other method of operation, is authorized and may be performed, and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade, if the agreement is in the public interest, protective of correlative rights, and reasonably necessary to increase ultimate recovery or to prevent waste of oil or gas. Such agreements bind only the persons who execute them, and their heirs, successors, assigns and legal representatives."

STATEMENT

This is an action at law for willful trespass and conversion of oil drained from petitioners' land by the underground migration across lease lines of water injected by respondent on the Kenmac "J" Sand Unit, which forced oil from petitioners' undeveloped lease onto the Unit, where it was produced by unit recovery wells.

The location of petitioners' land, the Kenmac Unit, and the contours of the oil bearing sand are shown on the plat which is a part of the opinion of the Supreme Court of Nebraska (Pet. App. 5).

Petitioners claimed and the trial court held that the underground migration of the oil and injected water was a willful trespass and, applying the common law rule of damages, entered a judgment against respondent of $89,933 for the value of the oil drained without the deduction of any costs of drilling and equipping the wells and of producing the secondary oil (Pet. App. 8).

The Supreme Court of Nebraska held that to apply the common law doctrine of willful trespass to the secondary recovery of oil by waterflooding was contrary to the public policy of the state and that the petitioners should be allowed to recover only such amount as petitioner, Baumgartner

> "could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project; that is, as if no unitization had occurred" (Pet. App. 18).

It remanded the case for a new trial under this rule of damages, since it considered that in one view of the evi-

dence, there might be no recovery, but in another view there might be a recovery of $12,224 (Pet. App. 19). The dissenting judge considered that the evidence was conclusive that there could be no recovery and that the judgment should be reversed and the cause dismissed (Pet. App. 19-20).

The Supreme Court of Nebraska adopted this rule of damages and rejected the common law doctrine of willful trespass in view of two facts which are noted in its opinion, but not in petitioners' statement of the case.

The first is that the petitioner, Baumgartner, "was given every opportunity to secure his just and equitable share of the oil in the pool by being offered fair, reasonable, and equal participation with the other interested parties in Kenmac. He refused to participate . . ." (Pet. App. 18).

This conclusion is not questioned by the petitioners, nor could it well be, since it is supported by the undisputed testimony of their own principal witness (Pet. App. 7) as well as by the order of the Nebraska Oil and Gas Conservation Commission which denied Baumgartner's application for a permit to drill an exception well on his lease (E 6: 54, 55, Vol. II). Baumgartner himself never offered any explanation for his refusal to pay his fair and equitable share of the intangible costs of the previously drilled wells taken over by the unit. It was because the other lessees declined to waive such payment that he refused to participate (Pet. App. 7). It is therefore undisputed on this record that the petitioner, Baumgartner, refused to join in Kenmac's secondary recovery operations on a fair and equitable basis.

The Supreme Court of Nebraska also based its decision upon the fact that "the operation of Kenmac was specifically authorized and approved by [the Nebraska Oil and Gas Conservation] commission, effective April 18, 1961, and that the project was at all times conducted in conformity with the order of the commission" (Pet. App. 12). It noted that such authorization and approval of Kenmac was in accord with the public policy of the state "to foster, to encourage and to promote . . . secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources." Rev. Stat. Neb. 1943, Reissue of 1960, § 57-901 (Pet. App. 8).

The court also noted the importance of the secondary recovery of oil to the economy of Nebraska, pointing out that approximately 40 per cent of the state's current production was secondary oil and that secondary oil represents 15 per cent of all the oil ever produced in the state (Pet. App. 9). It also noted that if petitioner's refusal to join the Kenmac Unit could have forced the other operators in the field to abandon the project, there would have ensued the "waste [of] more than a million and a half barrels of recoverable oil" (Pet. App. 12).

It was in view of these considerations that the Supreme Court of Nebraska declined to place the heavy burdens of a common law willful trespasser upon oil operators who fulfill Nebraska's public policy of conducting secondary recovery waterflooding operations and denied to oper-

ators who flaunt this policy, such as the petitioner, Baumgartner, the right to recover more than they could have recovered by their own independent operations in the absence of the waterflood.

ARGUMENT

The only federal question presented by this record and the decision of the Supreme Court of Nebraska is whether the State of Nebraska lacks constitutional power to limit the recovery of damages for oil drained from the lease of an operator who has refused to join in a unitized waterflood on a fair and equitable basis to the value of the oil that he could have recovered by his own independent operations in the absence of the waterflood.

Petitioners' contention that the state lacks such power does not present a substantial federal question in view of prior decisions of this Court upholding the constitutional validity of state regulation of the common law right of landowners to drill and produce at will on their land.

In its latest decision on the subject, this Court held that the contention that the Due Process and Equal Protection Clauses of the Fourteenth Amendment prevented Oklahoma from providing for the unitized management of common sources of supply of oil and gas "failed to raise any substantial federal questions." *Palmer Oil Corp.* v. *Amerada Pet. Corp.*, 343 U.S. 390, 391 (1952).

Similarly, it held to be "virtually without substance" the contention that the Due Process Clause prohibits Oklahoma from compelling a gas producer, who owns a pipeline

and has a market, to purchase rateably from a producer who does not at a price fixed by the state commission. *Cities Service Gas Company* v. *Peerless O. & G. Co.*, 340 U.S. 179, 185 (1950).

It held that "no substantial federal question" was presented by the contention that Louisiana was barred by the Due Process Clause from compelling the unitization of separately owned tracts into a single drilling or spacing unit. *Hunter Co.* v. *McHugh*, 320 U.S. 222, 227 (1943). The contention that Oklahoma does not have similar power likewise "failed to raise a substantial federal question." *Patterson* v. *Stanolind O. & G. Co.*, 305 U.S. 376, 379 (1939).

This Court has held that Oklahoma has the power to restrict oil production to market demand, *Champlin Ref. Co.* v. *Corp. Comm. of Okla.*, 286 U.S. 210 (1932), and that in allocating the allowable production between marginal wells and wells with high potentials, Texas may more severely restrict the production of the high potential wells. *Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

And it has upheld the power of California to restrict the volume of gas produced from oil wells to the amount which will result in the greatest ultimate recovery of oil, *Bandini Pet. Co.* v. *Superior Court*, 284 U.S. 8 (1931), the power of Wyoming to prohibit the production of natural gas for the manufacture of carbon black, *Walls* v. *Midland Carbon Co.*, 254 U.S. 300 (1920), and the power of Indiana to restrict the flaring of gas into the atmosphere to a period of two days following the completion of a well. *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900).

The Nebraska Supreme Court has recognized in its decision here the same considerations which this Court recognized to be the basis of state power in the decisions cited. These are the prevention of physical and economic waste of oil and gas, the greatest ultimate recovery of oil and gas, and the protection of correlative rights to produce oil and gas. These considerations were first expounded by this Court in the leading case of *Ohio Oil Co.* v. *Indiana, supra.* They are the basis of the decision of the Supreme Court of Nebraska in this case.

The Supreme Court of Nebraska has not denied recovery of the value of the oil which Baumgartner could have produced by his own operations in the absence of the waterflood. In view of his refusal to share in the risks of the waterflood and his lessor's adoption of this refusal, the allowance of such recovery is an "equitable apportionment among landowners of the migratory gas and oil underlying their land" which is the hallmark of the validity of oil and gas conservation regulation. *Hunter Co.* v. *McHugh,* 320 U.S. 222, 227 (1943). Because of such refusal, other courts have denied any recovery whatever to dissenting landowners and lessees. *California Co.* v. *Britt,* 247 Miss. 718, 154 So.2d 144 (1963); *Tidewater Associated Oil Co.* v. *Stott,* 159 F.2d 174 (5th Cir. 1946), *cert. denied* 331 U.S. 817 (1947).

CONCLUSION

Thus there is no federal question of substance in this case and the petition for certiorari should be denied.

Respectfully submitted,

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